

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID L. DANIELS)	
Claimant)	
)	
VS.)	Docket No. 256,287
)	
SWIFT ECKRICH)	
Self-Insured Respondent)	

ORDER

Claimant requested review of the February 23, 2005 Review and Modification Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on July 27, 2005.

APPEARANCES

C. Albert Herdoiza of Kansas City, Kansas, appeared for the claimant. Mark E. Kolich of Lenexa, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is an appeal from a review and modification proceeding. On December 10, 2001, the parties entered into an Agreed Award which provided that claimant had a 22.5 percent functional impairment and was entitled to a running award in the amount of \$32,746.50. The claimant retained the right to review and modification of the Award. On September 17, 2003, the claimant filed an application for review and modification. Claimant alleged that his physical condition had worsened and his functional impairment had increased.

The Administrative Law Judge (ALJ) found the claimant failed to meet his burden of proof that he suffered any change in his functional impairment. The ALJ determined that

claimant's medical expert did not properly use the *AMA Guides*¹ to arrive at claimant's functional impairment rating because the doctor used the Range of Motion model instead of the Diagnosis-Related Estimates (DRE) Model and that he did not follow *AMA Guides* protocol in taking the range of motion measurements. Consequently, the ALJ determined that opinion could not be considered and because claimant failed to present any evidence that complied with the *AMA Guides* the ALJ deemed the proceeding frivolous and assessed the court reporter fees against the claimant.

The claimant requests review of the following: (1) whether the claimant failed to sustain his burden of proof that he suffered an increase in his functional impairment; (2) whether the ALJ erred in interpreting the *AMA Guides*; and, (3) whether the ALJ erred in assessing court reporter fees against the claimant. Claimant argues he met his burden of proof to establish that he has suffered a 7.5 percent increase in functional impairment based on Dr. Edward J. Prostic's opinion.

Respondent argues that Dr. Prostic's opinion is not based upon a proper utilization of the *AMA Guides* and his opinion should not be considered. Consequently, respondent requests the Board to affirm the ALJ's decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a work-related injury to his low back and on September 20, 2000, Dr. Jeffrey T. MacMillan performed surgery on claimant's back. The surgery was an anterior lumbar interbody fusion of the disks at L4-5 to L5-S1. On July 17, 2001, Dr. MacMillan rated claimant's impairment at 20 percent. In September 2001, claimant's medical expert, Dr. Prostic rated claimant's impairment at 25 percent. Both doctors ratings were based upon the *AMA Guides*. Dr. MacMillan's rating was based upon DRE Category IV, Loss of Motion Segment Integrity and Dr. Prostic's rating was based upon DRE Category V, Radiculopathy and Loss of Motion Segment Integrity.

As previously noted, the parties settled this dispute by entering into an Agreed Award for a 22.5 percent functional impairment. Claimant was provided accommodated employment and work disability was not an issue. But claimant continued to experience back pain and returned to Dr. MacMillan for additional treatment. Ultimately, a second

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

surgical procedure was performed on claimant's lumbar spine. On August 26, 2002, Dr. MacMillan performed a pedicle screw instrumented fusion at L4-5 to L5-S1. Dr. MacMillan determined claimant had reached maximum medical improvement on June 10, 2003, and again rated claimant's functional impairment at 20 percent based upon the *AMA Guides*. Dr. Prostic rated claimant's functional impairment at 30 percent based upon the Range of Motion Model of the *AMA Guides*.

Claimant testified his back pain and physical abilities worsened after the second surgery and filed for review and modification of his award based upon his changed physical condition. Work disability is not an issue and claimant's entitlement to permanent partial general disability benefits should be based on his permanent functional impairment rating.²

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.³

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.⁴ In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.⁵ Our appellate courts have consistently

² See K.S.A. 44-510e(a).

³ K.S.A. 44-528.

⁴ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

⁵ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.⁶

As previously noted, work disability is not an issue in this case and claimant's entitlement to permanent partial disability benefits is based on claimant's permanent functional impairment as established by competent medical evidence and based on the *AMA Guides* if the impairment is contained therein.⁷

Both Drs. MacMillan and Prostic expressed opinions on claimant's permanent functional impairment after each of claimant's back surgeries. Both doctors utilized the *AMA Guides* in determining claimant's functional impairment rating. And after claimant's first back surgery both doctors rated claimant's impairment using the DRE Model in the *AMA Guides*. However, after claimant's second back surgery Dr. MacMillan again rated claimant's functional impairment using the DRE Model but Dr. Prostic rated claimant's functional impairment using the Range of Motion Model.

Dr. MacMillan rated claimant at 20 percent based upon DRE Lumbosacral Category IV. The doctor noted that claimant's rating remained the same despite claimant having undergone a second surgery. The doctor explained:

Q. Now, is that an additional 20 percent or the same 20 percent?

A. The same 20 percent.

Q. Why isn't it increased?

A. Once you've done a fusion, even if you do another surgery you're not eliminating anymore motion and the intention of the Guides is that it's a representation of impairment or loss of functional body parts. So if an individual gets an impairment rating for a two-level fusion and that two-level fusion is subsequently reinforced he hasn't lost anymore body parts or function thereof. So despite the second surgery there's no increase in the impairment.⁸

Both Drs. MacMillan and Prostic agreed that the *AMA Guides* provide that if a person fits a DRE category the subsequent surgical treatment of the impairment, whether successful or not, does not alter the original impairment rating. Dr. MacMillan further

⁶ See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

⁷ See K.S.A. 44-510e(a).

⁸ MacMillan Depo. at 16.

explained that if following the surgery there were additional objective findings that were not present before surgery, such as radiculopathy, and the new findings met the criteria for placing the person in a higher DRE Category, then the rating would be increased. But Dr. MacMillan concluded claimant did not present with any additional objective findings after the second surgery.

Conversely, Dr. Prostic thought it was unfair to rate claimant the same following a second fusion to his spine. As a result the doctor utilized the Range of Motion Model to rate claimant at 30 percent after the second surgery. The doctor agreed he used the DRE Model to rate claimant after his first surgery and further agreed that comparing a rating pursuant to the DRE Model and the Range of Motion Model was like comparing apples to oranges.⁹ And Dr. Prostic agreed that measuring range of motion is not a reliable determinative of impairment because it varies with repetition and with examiners. Moreover, a comparison of Dr. Prostic's reports concerning claimant's physical examination findings after each surgery indicate claimant's condition remained essentially the same following the second surgery.¹⁰ Finally, it appears that Dr. Prostic simply used either the DRE Model or the Range of Motion Model dependent upon which provided claimant a higher impairment rating. The doctor testified:

Q. And so in the first instance when you rated this gentleman, had you used the range of motion model, his rating would have been lower. But you decided to go with a higher DRE category. And now, the second time you rated him, if you used the DRE versus the range of motion, the DRE would be lower. But now you're deciding to go with range of motion, which is higher. That's essentially where we're at; right?

A. I think you broke the code.¹¹

Both Dr. Prostic's failure to rate claimant's impairment according to the preferred DRE Model coupled with his admission that he uses either the DRE Model or the Range of Motion Model based upon which achieves a higher rating combine to undermine the credibility, weight and persuasiveness of his opinion.

The Board finds in this case that Dr. MacMillan's opinion is more persuasive than Dr. Prostic's and affirms the ALJ's determination claimant failed to meet his burden of proof to establish an increase in his functional impairment.

⁹ Prostic Depo. at 44.

¹⁰ *Id.*, Ex. 1 & 4.

¹¹ *Id.* at 52.

The ALJ determined that Dr. Prostic's rating in this case could not be considered because he did not follow the mandates of the *AMA Guides* in arriving at his rating. As a consequence, the ALJ concluded claimant failed to present any medical evidence that complied with the *AMA Guides*, deemed the proceeding frivolous and assessed all of the court reporter fees against the claimant. The Board disagrees.

The ALJ found Dr. Prostic's permanent functional impairment rating after the second surgery could not be considered because the doctor did not follow the mandates of the *AMA Guides* in arriving at his rating. The ALJ concluded Dr. Prostic not only failed to utilize the preferred DRE Model but also failed to use an inclinometer in taking his range of motion measurements.

Both physicians utilized the *AMA Guides* in determining claimant's permanent functional impairment as required by statute. The Board finds that neither physician misapplied or misinterpreted the *AMA Guides* to a point that their opinions should be disregarded. These two physicians simply disagreed not only as to the interpretation as to how the *AMA Guides* should be applied in different circumstances but they also made different physical findings in regards to claimant's permanent condition as a result of his injuries.

The Board acknowledges that Dr. Prostic did not strictly comply with the *AMA Guides'* recommendation to measure range of motion with an inclinometer. But Dr. Prostic did indicate that he used his own method of measurement and then interpolated those measurements into the abnormal lumbosacral range of motion measurements contained in the tables located in the *AMA Guides*. The methods used by Dr. Prostic to measure range of motion as well as his utilizing the Range of Motion Model instead of the DRE Model simply go to the weight to be accorded his opinion not the admissibility. Accordingly, the Board concludes the claimant's attempt to modify the original award was not frivolous and modifies the ALJ's Award to assess court reporter fees against respondent.

AWARD

WHEREFORE, it is the finding of the Board that the Review and Modification Award of Administrative Law Judge Bryce D. Benedict dated February 23, 2005, is modified to assess court reporter fees against respondent and affirmed for different reasons as to the finding claimant failed to meet his burden of proof to establish an increase in his functional impairment.

IT IS SO ORDERED.

Dated this _____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director